FILED
APR 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1487

MICHAEL DeMICHELE and MARY P. DeMICHELE

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael and Mary P. DeMichele, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 10, 1974.

Opinions Below

The findings of fact and opinion of the Tax Court (Appendix A, *infra*, pp. 7-10) are reported at T.C. Memo 1973-115. The Court of Appeals was unable to write an opinion in this case; the judgment of the Court of Appeals is printed at Appendix B (*infra*, p. 11).

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the imposition of an income tax on $575.47 of petitioner Michael DeMichele's $1,984.38 ordinary and necessary trade or business expenses violates petitioner's rights under the 16th Amendment to the Constitution of the United States to be taxed only on petitioner's income.

2. Whether the Congress or Commissioner has any power under the 16th Amendment to the Constitution of the United States to impose a tax on more than petitioner's income.

3. Whether the Commissioner can, under the Constitution, abrogate petitioner's rights under the 16th Amendment to the Constitution of the United States to be taxed only on petitioner's income and impose an income tax on petitioner's ordinary and necessary trade or business expenses simply by asserting that "the description of the job site indicates that storage of tools was feasible".

4. Whether merely $1,408.91 of petitioner's $1,984.38 expenses of driving to and from work by automobile are excludable and protected from a tax on income by the 16th Amendment to the Constitution of the United States or whether the entire $1,984.38 driving expenses are so excludable and protected.

Statutes and Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES

> 16th AMENDMENT. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Statement of the Case

During the year 1967, Michael DeMichele ("Michael") was in the trade or business of being an employee. In the process of receiving $10,506.37 wages in his trade or business, Michael paid or incurred $1,984.38 ordinary and necessary trade or business expenses of driving to and from work by automobile, deriving $8,521.99 gross income from his trade or business.

In addition to laying an income tax on Michael's derived $8,521.99 gross income, the Commissioner is attempting to lay an income tax on $575.47 of Michael's $1,984.38 trade or business expenses. The Commissioner's sole excuse for laying an income tax on $575.47 of Michael's trade or business expenses is "because the description of the job site indicates that storage of tools was feasible."

Reasons for Granting the Writ

1. A tax on $575.47 of Michael's $1,984.38 trade or business expenses is unconstitutional as violative of the 16th Amendment to the Constitution which grants Congress power to lay a tax on *incomes* — as distinguished from *expenses*.

2. The decision below conflicts with the Second Circuit decision in *Davis v. U.S.*, 87 F. 2d 323, 324, 325 (CAA 2d, 1937), *cert. denied* 301 U.S. 704, 81 L.Ed. 1359, 57 S.Ct. 937 (1937), where Circuit Judges Chase, Learned Hand, and Manton ruled as a matter of Constitutional Law that trade or business expenses may not be taxed as income by Congress or the Commissioner directly or indirectly.

3. The decision below conflicts with the Ninth Circuit decision in *Crowther v. Commissioner*, 269 F. 2d 292 (C.A. 9) where none of Crowther's automobile expenses of going to work were subjected to a tax on income.

4. The decision below conflicts with the Second Circuit's *first* holding in *Sullivan v. Commissioner*, 368 F. 2d 1007, that none of Sullivan's driving expenses could be subjected to a tax on income if Sullivan would not have driven his automobile to work but for the necessity of bringing his tools with him.

The *second* holding in *Sullivan* to the effect that two-thirds of Sullivan's driving expenses could be subjected to a tax on income if Sullivan "would have driven to and from work had it not been necessary to transport his tools" was based on an undefined "allocation" rule. The *second* holding in *Sullivan* has always been under attack by every knowledgeable tax and constitutional lawyer in the nation. The *second* holding of *Sullivan* has recently been rejected by this Court in *Fausner v. Commissioner*, 413 U.S. 838, decided June 25, 1973, *rehearing denied*, October 9, 1973.

In its *Fausner* opinion this Court did not address itself to the *first* holding in *Sullivan*, *supra*, that none of Sullivan's driving expenses could be subjected to a tax on income in a "*first*-holding" factual situation. Neither did this Court address itself, in its *Fausner* opinion, to any question of Constitutional law.

Upon oral argument before the Second Circuit in the instant case, Chief Judge Kaufman and Judges Smith and Feinberg could not figure out any Constitutional basis for the Supreme Court's decision that Fausner's expenses could be subjected to a tax on income. It seemed to all of us at oral argument that the Supreme Court "happenstance" ruling in *Fausner* was an error which probably came about because the Supreme Court did not permit the filing of briefs by either side in the *Fausner* case and did not permit oral argument by either side in the *Fausner* case.

5. The decision below conflicts with the Seventh Circuit's *first* holding in *Tyne v. Commissioner*, 385 F. 2d 40, *after remand*, 409 F. 2d 485, *cert. denied*, 396 U.S. 833, *on remand*, 29 T.C.M. 1398, *affirmed*, 468 F. 2d 913, where

that Court ruled that none of Tyne's driving expenses could be subjected to a tax on income if Tyne would not have driven his vehicle to work but for the necessity of bringing his tools with him.

The *second* holding in *Tyne* to the effect that 50% of Tyne's driving expenses could be subjected to a tax on income if Tyne "would have driven to and from work had it not been necessary to transport his tools" has always been under attack by every knowledgeable tax and constitutional lawyer in the nation. This *second* holding of *Tyne* has recently been rejected by this Court in *Fausner v. Commissioner, supra.*

In its *Fausner* opinion this Court did not address itself to the *first* holding in *Tyne, supra*, that none of Tyne's driving expenses could be subjected to a tax on income in a "*first*-holding" factual situation. Neither did this Court address itself, in its *Fausner* opinion, to any question of Constitutional law.

6. Upon oral argument of the instant case before the Second Circuit Court of Appeals, the Second Circuit judges made known their desire to have the Supreme Court issue guidance on the constitutional questions presented. They could not write an opinion in this case without guidance from the Supreme Court.

7. There are more than 50 million persons who travel to and from work in this nation. No reasoned direction is being provided this massive number of people on the question of how much of their trade or business expenses may be taxed as income.

8. Since the adoption of the 16th Amendment to the Constitution in 1913 and the enactment of the Income Tax Act of 1913, no definitive ruling has been made by the Supreme Court on the Constitutional questions here presented. Such a ruling is desirable in the administration of the Federal Tax Laws.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

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Attorney for Petitioners

April, 1974

Appendix A

T.C. Memo 1973-115

UNITED STATES TAX COURT

MICHAEL DeMICHELE and MARY P. DeMICHELE, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 2795-71. Filed May 22, 1973.

Thomas J. Carley, for the petitioners.

Fred L. Baker, for the respondent.

MEMORANDUM OPINION

SCOTT, *Judge*: Respondent determined a deficiency in petitioners' income tax for the calendar year 1967 in the amount of $83.79.

The issue for decision is the deductibility by petitioners of the portion of the deduction they claimed for automobile expense which was disallowed by respondent.

All of the facts have been stipulated and are found accordingly.

Petitioners, Michael and Mary P. DeMichele, are husband and wife who resided in Amityville, New York at the time of the filing of their petition in this case. They filed a joint Federal income tax return for the calendar year 1967 with the district director of internal revenue, Brooklyn, New York.

Michael DeMichele (hereinafter referred to as petitioner) was employed during the taxable year 1967 as a carpenter by Valdini Drywall Corporation of North Massapequa, New York and Approved Partition Co., Inc., of Massapequa, New York.

On his Federal income tax return for the calendar year 1967 petitioner deducted as "total deductible automobile expenses" the amount of $1,984.38. In computing this amount of deduction, petitioner stated the total months the automobile was used in business to be 12 months, that the total mileage of the 12 months was 17,793 miles, and that the portion of this mileage "applicable to business" was 17,793 miles. Petitioner included in the automobile expenses computed on his return an amount of $942.33 as depreciation which he showed to be depreciation on a "Ford truck" depreciated on a straight line basis with a useful life stated to be 3 years.

Respondent in his notice of deficiency disallowed $575.47 of the amount claimed by petitioner to be deductible automobile expense, with the following explanation:

> Employee Business Expense - The following automobile mileage has been disallowed (except for 1 full day representing a round-trip to transport tools to and from job site) because the description of the job site indicates that storage of tools was feasible:

Job Site Location	*No. Days Disallowed*	x	*Mileage*	=	*Disallowance*
Garden Apt: Port Jefferson	28	x	120	=	3,360
Garden Apt: Bay Shore	5	x	36	=	180
Bank-Hauppauge	7	x	63	=	441
Garden Apt: Port Jefferson	1	x	120	=	120
Mormon Church Plainview	11	x	32	=	352
Administration Bldg. Plainedge	10	x	16	=	160
Bank - Brooklyn	3	x	115	=	345
Funeral Home - Hicksville	7	x	35	=	245
	Total Miles Disallowed				5,203

Total Miles Disallowed 5,203
Total Business Miles Logged 17,793=29% Disallowed

Employee Business Expenses Claimed $1,984.38
29% Disallowed $575.47 (adjustment)

Petitioner's sole contention is that respondent, by using the words, "Total Business Miles Logged 17,793" in his explanation of his disallowance of automobile expenses in his notice of deficiency has conceded that the total mileage driven by petitioner in 1967 was "business miles logged." Petitioner states that this concession on the part of respondent in his notice of deficiency is tantamount to a concession that petitioner is entitled to deduct the total of the $1,984.38 which he claimed as employee business expenses since employee business expenses are properly deductible under section 162, I.R.C. 1954.[1]

In our view a reasonable interpretation of the explanation given by respondent in his notice of deficiency for the disallowance of $575.47 of the amount claimed by petitioner as automobile expenses is that of the total mileage of 17,793 miles driven by petitioner, 5,203 miles were not driven for business purposes. The use of the words, "Total Business Miles Logged," when considered in conjunction with the explanation of the claimed business expense deduction on petitioner's return showing 17,793 miles as "applicable to business," is merely an explanation of how respondent computed the percentage of the total miles driven which he considered to be non-business mileage. We do not view the statement in the context used in the deficiency notice to be a concession by respondent that petitioner drove 17,793 miles in 1967 for business purposes, or that the claimed business expense deduction of $1,984.38 was a proper deduction under the provisions of section 162.

In *Sullivan v. Commissioner*, 368 F. 2d 1007 (C.A. 2, 1966), reversing and remanding 45 T.C. 217 (1965), the

[1] All references are to the Internal Revenue Code of 1954.

Court of Appeals for the Second Circuit, to which an appeal in this case would lie, held that even if a taxpayer would have driven to and from work, had it not been necessary for him to transport his tools, he should be allowed to deduct as a business expense the portion of his reasonable driving expenses which is allocable to the transportation of the tools. The case was remanded to this Court for this Court to determine whether it was necessary for the taxpayer to transport his tools to and from his work, and whether the taxpayer would have driven to work, absent the necessity of transporting his tools. The Court of Appeals stated that if the taxpayer would not have driven to work, except for the necessity of transporting his tools, he should be entitled to deduct his reasonable driving expenses, limited to the cost of storage of the tools if some alternative means of storage of the tools was feasible. The Court further stated that if the taxpayer would have driven to work even had it not been necessary for him to transport his tools, then the expenses of driving to his work should be allocated between transportation of the taxpayer and transportation of his tools and only the amount for transportation of his tools allowed as a deduction, again limited to the cost of storage of the tools if some means of storage was feasible.

Respondent here has determined that storage of petitioner's tools was feasible in the instances set forth in the deficiency notice, and since no cost of such storage has been shown, the inference from his determination is that there would have been no cost for such storage. There is no showing in this case whether it was necessary for petitioner to carry his tools to and from work, if petitioner did find it necessary to carry his tools whether he would have driven to work regardless of this fact, or any other facts to show error in respondent's determination.

We therefore hold that petitioner has failed to offer proof to show error in respondent's disallowance of the $575.47 of the deduction claimed by petitioner for automobile expenses.

Decision will be entered for respondent.

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the Tenth day of January one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges

Michael DeMichele and Mary P. DeMichele,
Petitioners-Appellants,

v.

Commissioner of Internal Revenue,
Respondent-Appellee.

73-2299

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel. ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

IRVING R. KAUFMAN
Chief Judge

J. JOSEPH SMITH
WILFRED FEINBERG,
Circuit Judges

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1487

MICHAEL DEMICHELE AND MARY P. DEMICHELE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner[1] is a carpenter who regularly used his automobile to transport himself and his tools from home to his principal place of employment, and back again. The total mileage covered by petitioner during 1967, the year in question, was 17,793 miles. Petitioner deducted his automobile expenses in connection with this mileage from his adjusted gross income as an employee business expense. On audit, the Commissioner of Internal Revenue disallowed 29 percent of the claimed deduction (Pet. App. A 7-9).

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[1]References to petitioner are to Michael DeMichele. Mary P. DeMichele is a party only because a joint income tax return was filed for the year in issue.

The Commissioner's action was in accordance with *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (C.A. 2), which at the time was the governing rule in the Second Circuit. Under the *Sullivan* decision, a taxpayer was entitled to a deduction for expenses of carrying the tools of his trade back and forth to work. The Tax Court upheld the Commissioner's disallowance of 29 percent of the claimed deduction (Pet. App. A 7-10) and the court of appeals affirmed without opinion (Pet. App. B11).

After the decision of the Tax Court, but prior to the affirmance by the court of appeals, this Court announced its decision in *Fausner* v. *Commissioner*, 413 U.S. 838. In *Fausner*, the Court overruled the Second Circuit's decision in *Sullivan*, and held that a taxpayer cannot deduct his transportation expenses between his home and work, even if he carries necessary equipment, unless he can demonstrate that he incurred additional costs above his usual commuting expenses.

2. Despite this Court's explicit ruling in *Fausner* that commuting expenses are not deductible unless there is evidence of additional cost attributable to the transportation of tools, petitioner contends (Pet. 3) that the deduction of all commuting expenses is constitutionally mandated. Petitioner claims that the Sixteenth Amendment and decisional law proscribe the denial of commuting expenses as allowable deductions in arriving at income. But this court has held that (*New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440)--

> The power to tax income * * * is plain and extends to * * * gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

Since Congress has not provided a deduction for commuting expenses,[2] the court of appeals correctly upheld the Commissioner's disallowance of the claimed deduction.

Petitioner also asserts (Pet. 3-4) that this case conflicts with three other courts of appeals decisions. But this Court in *Fausner* not only overruled the Second Circuit's decision in *Sullivan*, but also rejected the Seventh Circuit's similar decision in *Tyne* v. *Commissioner*, 385 F. 2d 40, after remand, 409 F. 2d 485, certiorari denied, 396 U.S. 833, on remand, 29 T.C.M. 1398, affirmed, 468 F. 2d 913.[3] *Fausner* announced a uniform rule against

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[2]When the Internal Revenue Code of 1954 was enacted, Congress recognized that the expense incurred in commuting to and from work "constitute[d] a personal living expense and * * * [was] never deductible." H.Rep. No. 1337, 83d Cong., 2d Sess., p. A19; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 169.

Indeed, since the enactment of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, commuting expenses have been considered nondeductible personal expenses. See S. 1048, 1 Cum. Bull. 101 (1919) Art. 101(a) of Treasury Regulations 62 (1921 Revenue Act); Art. 102 of Treasury Regulations 65 (1924 Revenue Act); Art. 102 of Treasury Regulations 69 (1926 Revenue Act); Art. 122 of Treasury Regulations 74 and 75 (1928 Revenue Act); Art. 122 of Treasury Regulations 77 (1932 Revenue Act); Art. 23(a)-2(*c*) of Treasury Regulations 86 (1934 Revenue Act); Art. 23(a)-2(*c*) of Treasury Regulations 94 (1936 Revenue Act); Art. 23(a)-2(*c*) of Treasury Regulations 101 (1938 Revenue Act); Sec. 19.23(a)-2(*c*) of Treasury Regulations 103 (1939 Code); Secs. 29.23(a)-2(*c*) and 29.23(a)-15(*b*) of Treasury Regulations 111 (1939 Code); Secs. 39.23(a)-2(i) and 39.23(a)-15(f) of Treasury Regulations 118 (1939 Code); Secs. 1.62-1(g), 1.162-2(e), 1.212-1(f), and 1.262-1(b)(5) of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.). See also *Sullivan* v. *Commissioner*, 1 B.T.A. 93.

[3]Nothing in *Crowther* v. *Commissioner*, 269 F.2d 292 (C.A. 9), supports petitioner's argument (Pet. 3). There, the only issue was the deductibility of transportation expenses to temporary work sites.

the deductibility of such transportation expenses.[4] The decision below, with respect to the disallowed expenses, is entirely consistent with *Fausner*.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

In any event, the Ninth Circuit has at the least strictly limited *Crowther* to its facts, and possibly has overruled it. See, *e.g.*, *Sanders* v. *Commissioner*, 439 F.2d 296, certiorari denied, 404 U.S. 864.

[4]Since *Fausner*, the Court has denied certiorari in one case presenting this issue. *Coker* v. *Commissioner*, 480 F.2d 146 (C.A. 2), certiorari denied, January 7, 1974 (No. 73-636).

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PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the United States:

Petitioners Michael DeMichele and Mary P. DeMichele present this petition for a rehearing in the above entitled case and, in support thereof, respectfully show the following.

The Court's Action Herein

On June 17, 1974 this Court denied the petition for a writ of certiorari in the above-entitled case.

Reasons for Granting a Rehearing

The rehearing petitioned for should be granted for the following reasons:

THE COMMISSIONER'S RELIANCE ON *FAUSNER, INFRA*, IS INAPPOSITE BECAUSE THAT CASE DID NOT DEAL WITH ANY OF THE CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE.

This Court opened a Pandora's box with its decision in *Fausner* v. *Commissioner*, 413 U.S. 838, affirming a Fifth Circuit decision reported at 472 F. 2d 561. In that case Fausner claimed a legislative grace deduction under §162(a) for commuting expenses and this Court ruled that Fausner was not entitled under §262 to such deduction. In that case this Court accepted as the law-of-the-case the strange agreement between Fausner and the Commissioner that commuting expenses were nondeductible "personal" expenses. Having made this strange agreement, Fausner then asked this Court to allow as a deduction part of what he conceded to be entirely nondeductible because he carried incidentals of his occupation with him, on the theory that a part of the expenses Fausner conceded to be nondeductible should be allocated to his transported flight bag and overnight bag and the part thus allocated should be deductible.

Instead of a reasoned disposition, this Court issued a short 2-page opinion quoting the Fifth Circuit to the effect that there was no rational basis for any allocation between what Fausner conceded as the law-of-his-case to be a nondeductible commuting component and the deductible business component of the total expense. This Court also quoted the Fifth Circuit's unsubstantiated assertion that Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. Neither this Court nor the

Fifth Circuit defined either of the terms "commuting" or "commuting expenses". Neither this Court nor the Fifth Circuit has cited any Internal Revenue Code section showing that "Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense" — for the simple reason that there is no such Internal Revenue Code provision showing any such asserted determination.

In referring to the unreadable, vague and indefinite language of §262, this Court said:

> *We cannot read §262 of the Internal Revenue Code* as excluding such expense from "personal" expenses because by happenstance the taxpayer must carry incidentals of his occupation with him.

for the simple reason that no one can read §262 as including or excluding anything. The language of §262 is so vague and indefinite as to be unconstitutional.

The stark honesty of this Court in admitting that "we cannot read §262 of the Internal Revenue Code ***" leads also to the long established rule that:

> Taxing statutes are not to be extended by implication beyond the *clear* import of the language used; and *doubt* as to the meaning of their words *must* be resolved against the Government and in favor of the taxpayer. *United States* v. *Merriam*, 263 U.S. 179, 187.

which in turn leads right back to this Court's honest admission in *Fausner* that "We cannot read §262 of the Internal Revenue Code ***". Neither can this Court's honesty be faulted because there is no clear import of the language of §262.

JUDGE LEARNED HAND AND HIS COLLEAGUES SPELLED OUT THE ANSWERS TO THE CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE.

As Second Circuit Judges Chase, Learned Hand and Manton clearly explained the matter in *Davis* v. *U.S.*, 87 F. 2d 323, 324, 325 (CCA 2d 1937), *cert. denied* 301 U.S. 704, 81 L.Ed. 1359, 57 S. Ct. 937 (1937), there are two separate and distinct classes of deductions:

FIRST CLASS (Constitutionally Required) DEDUCTIONS- *those deductions over which Congress has no power or control* - deductions such as ordinary and necessary expenses incurred in getting or obtaining receipts, cost of property sold, depreciation, depletion and the like. Such First Class deductions are "inherently necessary" *as a matter of computation* to arrive at "income" which may be taxed. This First Class (Constitutionally Required) Deduction mandates a decision for petitioners in this case.

SECOND CLASS (Legislative Grace) DEDUCTIONS - deductions of another sort like personal exemptions, deductions for taxes paid, losses sustained in unrelated transactions and other like privileges which Congress sees fit to accord to taxpayers. Such Second Class deductions, *as distinguished from the First Class*, are allowed by Congress wholly as a matter of grace, citing *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435. These distinguished Second Circuit judges, at page 325 of the *Davis* case, thus gave full recognition to *New Colonial Ice Co.* as a Second Class case not concerning any First Class constitutional question. [1]

The Court (at page 324 of the *Davis* case) cautioned that First Class (Constitutionally Required) deductions "*are not to be confused*" with Second Class (Legislative Grace) deductions. First Class deductions are required *as a matter of computation* to arrive at "income" which constitutionally may be taxed. Second Class deductions are permitted to reduce true "income" down to an artificial "taxable income" if Congress decides to impose a tax on a lesser amount than constitutionally it could.

1 The Commissioner's reliance on *New Colonial Co.* v. *Helvering* (a/k/a *New Colonial Ice Co.* v. *Helvering*) 292 U.S. 435 (Memo 3) is entirely inapposite inasmuch as that case did not deal with any constitutional questions as here presented. The facts and law of that case are abundantly clear in the context of the case then decided by the Supreme Court. That case dealt with the years 1922 and 1923 and the question of whether one (New) corporation was entitled under Section 204 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 231 to reduce its income by deducting losses suffered in a prior year by a second (Old) company.

There was no question in that case about the computation of gross income or loss of either the New company or the Old company. The New company claimed that *its* gross income (*its* receipts minus *its* expenses incurred in obtaining *its* receipts) should be reduced by the losses suffered by the Old corporation in a prior year. The Court explained, at page 439, that

> What is being taxed in this instance is the income realized by the new company in conducting the business after the transfer; and the sole matter for decision is whether, under Section 204 (b), there shall be deducted from that income the losses suffered by the old company in its conduct of the same business before the transfer.

In deciding against the New company's argument that the gross income of the New company must be reduced by the Old company's prior year losses to arrive at taxable income of the New company, the Court explained at page 440 that

> The power to tax income *like that of the new corporation* is plain and extends to the gross income.

In deciding against the New company's claim that it should be able to deduct from *its* gross income (*its* receipts minus *its* expenses) pursuant to Section 204 (b) the losses suffered by the Old company in a prior year, the Court explained at page 440 that

> Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

Thus the Court decided that the gross income of the New corporation could not be reduced artificially for the year in question by losses sustained in a prior year by a different corporation.

There was no question presented or decided in that case concerning "income taxation" of the New corporation's "expenses". The Court decided that each taxpayer was an entity by itself and could not claim *another* taxpayer's expenses or losses unless Congress made special statutory provision to reduce the *true* gross income (receipts minus expenses) of the New corporation down to an artificial "*taxable* income" against which tax rates will be applied to determine an income tax liability.

Neither was there presented or decided in that case any question concerning "income taxation" of the Old corporation's "expenses". Indeed it is clear that the Old corporation's "expenses" were neither taxed nor attemptedly taxed as "income" to the Old corporation.

UNDER THE DOCTRINE OF *DAVIS* V. *U.S.*, *SUPRA*, THE PETITIONER HEREIN IS ENTITLED TO DEDUCT HIS ORDINARY AND NECESSARY EXPENSES INCURRED IN OBTAINING HIS WAGES *AS A MATTER OF COMPUTATION* TO ARRIVE AT INCOME WHICH MAY BE TAXED.

The facts of this case are very simple. Petitioner Michael DeMichele deducted from his $10,506.37 wages his admittedly ordinary and necessary trade or business driving expenses of $1,984.38 incurred in obtaining his $10,506.37 wages to arrive at his admitted gross income of $8,521.99 from his trade or business.

Not satisfied with imposing an income tax on petitioner's $8,521.99 gross income from his trade or business, the Commissioner is attempting to impose an *income* tax on $575.47 of Petitioner's $1,984.38 admittedly ordinary and necessary trade or business *expenses* because "the description of the job site indicates that storage of tools was feasible." The Commissioner's attempt is irrational and unconstitutional.

Boiled down, the Commissioner's position in this case is that, of the Petitioner's $1,984.38 driving expenses, $1,408.91 driving expense is deductible and that he can impose an "income" tax on the remaining $575.47 driving "expenses" — although the Commissioner cannot explain how he claims to have such authority to tax "expenses".

The Commissioner's position is untenable in face of, and repugnant to, the 16th Amendment to the Constitution.

At no time or point in that case was there presented or decided any question concerning the New company's own expenses of running its own business. No one had the temerity even to suggest that the New company's own *expenses* of operating its own business could be subjected to an *income* tax either directly or indirectly.

CONCLUSION

The petition for rehearing, as well as the petition for a writ of certiorari, should be granted and the case set for oral argument.

Respectfully submitted,

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July, 1974

Certificate of Counsel

I, THOMAS J. CARLEY, attorney for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

THOMAS J. CARLEY
Attorney for Petitioners